Supreme Court, U. S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

Term 1978

~~78~~-107

No. .....

HAROLD L. WHITNEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit**

LONDON, GREENBERG & FLEMING
NORMAN S. LONDON
LAWRENCE J. FLEMING
1600 Boatmen's Tower
100 North Broadway
St. Louis, Missouri 63102
(314) 231-8700
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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HAROLD L. WHITNEY,
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UNITED STATES OF AMERICA,
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## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit**

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on May 23, 1978.

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is unpublished, but is appended hereto as Exhibit A.

## JURISDICTION

Petitioner was tried on an indictment returned September 29, 1977 in United States District Court for the Eastern District of Missouri on charges of violating 26 U.S.C. §7203 (1970), *i.e.*, willfully failing to file timely federal income tax returns for the years 1971 and 1972. Although it was undisputed that petitioner had filed his delinquent returns on February 21, 1974 and had paid all taxes, interest and penalties due, the trial court denied petitioner's pre-trial motion to dismiss the charges because of selective prosecution and pre-indictment delay. Also denied was a motion *in limine* to exclude evidence concerning petitioner's tax filings in years other than the years charged, including evidence pertaining to years 1960 and 1961. Such evidence was admitted at trial, over petitioner's objections. On appeal, the United States Court of Appeals for the Eighth Circuit refused to reverse despite petitioner's contentions: that evidence of other wrongful acts was improperly admitted at trial; that a four pre-indictment delay was prejudicial; and that selective prosecution was unjustifiable in this case. The Appellate Court decision was filed May 23, 1978 and this court has entered its order extending the time for filing this petition until July 22, 1978. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Whether evidence on filing a previous tax years is admissible in a willful failure to file prosecution under Federal Rule of Evidence 404(b)'s exception to normal exclusion of evidence of other wrongful acts when such evidence is incomplete, inconclusive, remote in time, unpatterned, and prejudicial? And if so admissible, is a decision based on such uncertain, remote evidence a denial of due process?



2. Whether Equal Protection permits the United States to selectively enforce the revenue laws by indicting a taxpayer for charges based on certain tax years, when the taxpayer does not capitulate to an Internal Revenue Service (IRS) payment schedule for an unrelated tax dispute?

3. Whether a four year delay in indictment on a failure to file charge violates due process when the taxpayer has filed his delinquent returns and has paid all taxes, interest and penalties due and consequently foregoes the opportunity to prepare any defenses while events are clear and recent?

## STATUTES INVOLVED

26 U.S.C. §7203 (1970): (text . . .)

Federal Rules of Evidence, Rule 404(b):

> (b) Other crimes, wrongs, or acts. Evidence or other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

U.S. Const., Amend. V

U.S. Const., Amend. XIV

## STATEMENT

On September 29, 1977, Petitioner Harold L. Whitney was charged under title 26, United States Code, Section 7203, in a two-count indictment in United States District Court for Eastern Missouri, alleging a willful failure to file income tax returns in

the years 1971 and 1972. Prior to trial, the United States stipulated that all taxes, interest and penalties assessed against Petitioner for the 1971 and 1972 tax years had been paid on February 21, 1974, nearly four years before the indictment was secured. It was further stipulated that if the former United States Attorney for Eastern Missouri were called to testify, he would state that his office recommended against prosecution and, in fact, declined to prosecute Petitioner. The United States Department of Justice provided an attorney from its Tax Division to initiate these proceedings.

Also prior to trial, Petitioner moved to dismiss the indictment on the grounds of selective prosecution and pre-indictment delay. This motion was denied as was Petitioner's request for production of the government's file relating to the decision to prosecute, although an *in camera* inspection of the file was made by the Court, and the file was made part of the Record.

In the 1978 trial, a considerable amount of evidence concerning Petitioner's tax filing history for the years 1960 through 1966 was admitted over Petitioner's objections both at trial and in his motion *in limine* to suppress. Petitioner contended this information was remote and irrelevant to the 1971 and 1972 tax year charges before the Court.

The disputed evidence centered around a copy of Internal Revenue Form 4340, a certificate of Assessments and Payments of Form 1040 for Petitioner for the years 1960-1965. An Internal Revenue agent was permitted to testify that this form showed that Petitioner failed to file income tax returns in 1960 and 1961. However, this same agent later admitted that he could not determine from the documents whether a return was properly filed for those years. Still relying on this Form 4340, the same agent stated that Petitioner filed late returns for the years 1963, 1964 and 1965. However, it was later established that the Internal Revenue record revealed only the dates of assessment, and not the dates the returns were actually filed.



The circumstances surrounding the determination to prosecute petitioner were disclosed partially during the testimony of another Internal Revenue Agent. In 1973, Agent Robert Scanlon was in the process of investigating and interviewing Petitioner about a disputed underpayment of taxes for the year 1970. During an interview Petitioner told the agent that his 1971 and 1972 returns were delinquent, but that he was attempting to have them prepared and filed. Thereafter a dispute arose regarding the method of payment of the 1970 taxes. Agent Scanlon would not grant Petitioner's request for a deferred payment arrangement on the 1970 dispute. The agent told Petitioner that he must pay the 1970 amount within 20 days or face the "consequences". At trial, the agent admitted that he referred the 1971 and 1972 delinquency matter to the Intelligence Division only after Petitioner failed to meet the agent's deadline for the 1970 payment. Petitioner paid the 1970 amount 3 days after the agent's deadline and paid all taxes, interest and penalties when he filed his 1971 and 1972 returns on February 21, 1974. Four years later, petitioner was prosecuted for his failure to file timely returns in 1971 and 1972.

During the trial, the Court received as evidence, over Petitioner's objection, Petitioner's IRS records, for the years 1960 through 1970 on the theory that these records indicated late filings in several of the previous years and were therefore evidence of intent and admissible under the Federal Rules of Evidence, Rule 404(b).

After conviction, the decision was upheld on appeal to the Eighth Circuit, despite Petitioner's argument that the records of prior years did not constitute clear and convincing evidence of prior acts of misconduct, since there was no conclusive evidence that the records indicated delinquent filings and certainly no showing that any earlier tardiness in filing had been "willful."

## REASONS FOR GRANTING THE WRIT

1. **This Court Should Examine the Eighth Circuit's Standard for Applying Federal Rule of Evidence 404(b) Because:**

(a) **It conflicts with the standards used by other Circuits;**

Federal Rule of Evidence 404(b) (Publ. L. No. 93-595, Stat. 1925) (hereafter FRE) applies the common law rule of evidence that a crime may not be proven by evidence of other, unrelated wrongful acts. See *Michelson v. United States*, 335 U.S. 469 (1947). See generally, *Slough of Knightly, Other Vices, Other Crimes*, 41 Ia. L. Rev. 325 (1956). The evidence presented in this case is precisely the type of material that FRE 404(b) is designed to exclude.

Admission of the prior years tax records as evidence against petitioner was upheld by the Court of Appeals under the FRE 404(b) exception that evidence of other wrongful acts is admissible to show "intent". However, it is unclear from the decision of the Eighth Circuit and other Circuits when this exception is properly triggered and what quality of evidence it permits. This lack of uniformity throughout the federal courts is incompatible with the goal of Congress in enacting the Federal Rules "to secure fairness in administration" of trials through a uniform code of evidence. See FRE 102.

As indicated by recent Eighth Circuit cases (*United States v. Maestas*, 554 F.2d 834 (8th Cir. 1977); *United States v. Jones*, — F.2d — (No. 77-1490, filed February 16, 1978)), the government in its brief to the court below (at p. 15), and scholarly commentators (2 F.R.Evid. News 34-36 (1977)), it is unclear whether the Eighth Circuit has completely abandoned the pre-FRE four point common law test of *United States v. Clemons*, 503 F.2d 486 (8th Cir. 1974) (i.e., evidence of other crimes or wrongful acts is *not* admissible *unless*



(1) a legitimate exceptional issue (i.e., intent) is raised, (2) the preferred evidence is relevant to that issue, (3) the evidence is *clear* and *convincing, and* (4) the probative worth outweighs the probable prejudicial impact).

In *Maestas, Supra,* and *Jones, Supra,* the Eighth Circuit intimates that passage of the New Rules of Evidence compel it to abandon the *Clemmons* tests or at the least alter it.

Opposed to this abandonment of tests for evidence of other wrongful acts is the Fifth Circuit's continuation of such tests. See *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977); *United States v. Rice*, 550 F.2d 1364, 1372 (5th Cir. 1977) (i.e., evidence must be (1) *plain, clear,* and convincing, (2) not remote, (3) introduced for a purpose sanctioned by FRE, (4) introduced on a material elements of the charged offense in issue, (5) needed for probative value, and (6) probatively more valuable than prejudicial).

It is submitted that the patchwork of FRE 404(b) standards evidenced by the conflicting rules of these Circuits is incompatible with the Congressional intent in enacting the Federal Rules (and the intent of this Court in approving the drafts). A defendant in the Fifth Circuit is assured that unconvincing, remote evidence of other alleged wrongful acts will be inadmissible at his federal trial while a defendant in Eighth Circuit must suffer the prejudicial admission of incomplete, inconclusive evidence.

As this Court is undoubtedly aware, such evidentiary issues arise daily in federal trials and the confused status of FRE 404(b) affects a vast number of present and future defendants.

(b) **Even if Congress did not intend FRE 404(b) to be applied uniformly throughout the Circuits, the Eighth Circuit FRE 404(b) standard fails to meet the minimum standard intended by Congress;**

The Federal Rules of Evidence are silent on the preliminary steps for an FRE 404(b) analysis. The advisory committee's notes caution: "no mechanical solution is offered." The Eighth Circuit has concluded that anaylsis should encompass: (1) whether a legitimate 404(b) exceptional issue (e.g. intent, motive, etc.) is involved, and (2) if so, whether the probative value of the evidence outweighs probable prejudicial impact (FRE 403) *United States v. Maestas*, 554 F.2d 834, 836-37, At No. 2 (1977). All tests in the *quality* of the preferred evidence have disappeared except for the prejudicial balancing test. In short, FRE 403* appears to be the only check applied by the Eighth Circuit on FRE 404(b) as long as the "exceptional" categories are involved.

It is submitted, however, that this interpretation causes the exception to merely swallow the rule. The general rule is that no evidence of other wrongful acts is admissible, not just prejudicial evidence is inadmissible. Congress, by involving the common law terminology associated with this respected rule, surely meant that FRE 404(b) have its own criteria, and not be merely checked by FRE 403. Otherwise Congress would have referred to FRE 403 directly or used the word "prejudicial" in the rule. Instead, the clear implication is that the common law heritage of this rule be retained by the federal courts. This itself is reflected in above-noted passage in the Advisory Committee's note to FRE 404(b). A "mechanical

* Rule 403 provides "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."



solution" would be to directly tie 404(b) standards of admissibility to FRE 403. This was not done, rather the process is similar but not identical. It is submitted that tests of the evidence's *quality* were intended by Congress.

By limiting exclusion to considerations of prejudice alone, the Court below allows incomplete, inconclusive, remote evidence to be admitted. Such evidence could not have been admitted under the *Clemmons, supra*, pre-FRE standard.

Besides the above, of course, it is quite arguable that the District Court's discretionary admission of the evidence in this case did not meet the Eighth Circuit's standard itself. Whether the evidence indicated Petitioner's "intent", whether it was not prejudicial, whether any sort of attempt was made to find alternative, probative evidence of "willfulness"—all these are arguable points are circumvented by the court's desertion of the clearer, fairer *Clemmons* test. The Federal Rules of Evidence were enacted to regularize federal evidence law, not to make it more evasive and amorphous. Congress could not have intended so confused a result on so important a point.

To prevent such concededly haphazard convictions, this Court should review this FRE 404(b) question.

(c) **Even if the Eighth Circuit Rule 404(b) standards conform to Congressional intent, such a rule of evidence, as now phrased and implemented, violates Due Process.**

If Congress indeed meant to sanction use of other wrongful acts evidence, checked only by FRE 403, "prejudice" caution, then convictions like the case at bar are attainable by use of inconclusive, incomplete, remote, and unpatterned circumstantial evidence of other wrongful acts. A prosecutor no longer need focus on producing evidence of the actual crime charged; he may base his proof of essential elements on distant, nearly

forgotten acts. Such a prosecution offends due process guarantees of "substantial justice", "essential fair play". One should be convicted only for the crime tried, and the crime should be fairly and clearly proven.

2. **This Court Should Rule That Selective Prosecution of the Revenue Laws Should Not Be Based, Even in Part, on a Taxpayer's Failure to Acquiesce to a Disputed, Government-Set Tax Payment Schedule, as Such Discriminatory Prosecution Constitutes a Bad Faith Effort to Apply Criminal Sanctions to a Civil Collection Effort.**

Selective prosecution of the revenue laws has been judicially approved. *Spies v. United States*, 317 U.S. 492 (1943). However, in the instant case there was evidence that Petitioner was prosecuted only after he failed to meet an IRS set payment deadline on an unrelated tax dispute. Petitioner was given the choice of complying with the agent's payment demands or facing the "consequences".

Since it is clearly conceivable, and most probable, that many taxpayers are simultaneously involved in several separate tax year disputes with the government, this IRS technique is an effective bargaining tool. Presumably then, the government forebears prosecuting those taxpayers who acquiesce to such payment schedules. By paying, they avoid the "consequences" and are not selectively prosecuted.

Obviously the availability of this levage power by the IRS agent will have a chilling effect on taxpayers rights to appeal even unrelated dispute.

Other evidence of this case points to the inequity of the "selective" prosecution. The total payments of the 1971 and 1972 taxes, interest and penalties were made almost four years prior to the indictment. In this interim, the office of the United States Attorney involved refused to prosecute the case.



This Court should rule that the Constitution is offended by the collection technique used here, i.e. suggesting that a taxpayer give up rights on one tax dispute or force prosecution on another. Due process is further offended when petitioner is prosecuted four years later. This "selective" prosecution cannot be judicially approved: it is a clear violation of equal protection.

3. **The Court Should Determine Whether a Four Year Delay in Indictment in a Failure to File Case After Full Payment of Taxes, Interest, and Penalties Violates Due Process.**

Although some courts have held that mere preindictment delay is a violation of due process *Ross v. United States*, 349 F.2d 210 (D.C.Cir. 1965); *United States v. Jasper*, 331 F. Supp. 814 (E.D. Pa. 1971); *United States v. Wahrer*, 319 F.Supp. 585 (D. Alaska 1970), this Court has yet to state so broad a rule. However, *see United States v. Morion*, 404 U.S. 307 (1971).

The violation subject to the pre-indictment delay here was a tax matter, subsequently assessed and fully paid almost four years before indictment. On these facts then, Petitioner was induced to believe that he had fully satisfied the government.

Needless to say, such a delay also implicates other constitutional rights of Petitioner. The right to a speedy trial was circumvented (though not technically a 6th Amendment violation) by the governments' procrastination. Additionally, Petitioner was denied full, effective assistance by counsel as Petitioner could not as well assist counsel regarding events which occurred seven years before trial, the recollections of which had faded.

This Court should evaluate the equities in this case and hold that such significant dilatory behavior does violence to Petitioner's constitutional rights particularly where there is no apparent explanation for the delay.

## CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

LONDON, GREENBERG & FLEMING
NORMAN S. LONDON

By LAWRENCE J. FLEMING
Attorney for Petitioner
1600 Boatmen's Tower
100 North Broadway
St. Louis, Missouri 63102
(314) 231-8700

# APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 78-1112

United States of America,
Appellee,

v.

Harold L. Whitney,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: April 12, 1978

Filed: May 23, 1978

Before Bright and Ross, Circuit Judges, and Talbot Smith, Senior District Judge.*

*Per Curiam.*

Harold L. Whitney appeals from a conviction for willfully failing to file timely federal income tax returns for 1971 and 1972, in violation of 26 U.S.C. § 7203 (1970). We affirm.

The evidence established that Whitney failed to file timely tax returns for 1971 and 1972. He filed the returns and paid the overdue taxes, along with interest and penalties, on February 21, 1974, following the initiation of an investigation into his delinquencies by the Internal Revenue Service (IRS). Whitney defended the prosecution primarily by contending that his failure to file timely returns was not willful, but resulted from pressures of family problems and business responsibilities.

On appeal, Whitney first contends that the trial court erred in admitting evidence of his federal tax filing history from 1960 through 1969. The Government, over objection by Whitney's

* TALBOT SMITH, United States Senior District Judge, District of Michigan, sitting by designation.

counsel, introduced testimony and IRS records indicating that Whitney had failed to file timely returns for the years 1963, 1964, 1965, 1967, 1968, and 1969, and that the IRS had no record of returns for 1960 and 1961. These IRS records, however, showed timely filing for 1962, 1966, and 1970.

We reject all of Whitney's arguments relating to this evidence. The evidence reflects Whitney's intent and knowledge, and it therefore is admissible under Rule 404(b) of the Federal Rules of Evidence. We do not view the evidence as unduly remote in time from the period covered by the indictment, for it covers the years immediately preceding the crimes charged. We reject Whitney's argument regarding the need for clear and convincing evidence of "other crimes"; the evidence in question related only to "other acts," not crimes, and the Government presented adequate evidence of those acts. If any error occurred in admitting the evidence relating to 1960 and 1961, an effective cross-examination by Whitney's counsel destroyed any adverse impact and rendered the error harmless. Finally, whatever prejudicial impact the evidence as a whole may have had did not outweigh its probative value. *See* Fed. R. Evid. 403.

Whitney's second contention on appeal is that he was the victim of selective prosecution. After examining the Government's prosecution file *in camera*, the trial court denied Whitney's motion to dismiss the indictment for reason of selective prosecution. We have made an independent examination of the Government's file and agree with the district court's conclusion.

Accordingly, we affirm.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

[Not to be published.]

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 78-107

# In the Supreme Court of the United States

OCTOBER TERM, 1978

HAROLD L. WHITNEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*

M. CARR FERGUSON
*Assistant Attorney General*

CHARLES E. BROOKHART
LIBERO MARINELLI, JR.
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. A-1 to A-2) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on May 23, 1978. By order of Mr. Justice Blackmun of June 7, 1978, the date for filing a petition for a writ of certiorari was extended to and including July 22, 1978. The petition for a writ of certiorari was filed on July 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether in a prosecution for failure to file timely income tax returns, the district court abused its discretion by permitting the government to present evidence of petitioner's failure to file timely returns for years prior to the prosecution years.

2. Whether petitioner was the subject of selective prosecution or prejudiced by any preindictment delay.

## STATEMENT

In September 1977, petitioner was indicted in the United States District Court for the Eastern District of Missouri on two counts of willful failure to file timely income tax returns for 1971 and 1972, in violation of 26 U.S.C. 7203. After a jury trial, petitioner was convicted on both counts and was sentenced to a prison term of 90 days and fined $500. The court of appeals affirmed per curiam (Pet. 2, 3; Pet. App. A-1).

Prior to trial, petitioner moved to dismiss the indictment on the ground that his case had been improperly selected for prosecution. He also moved to inspect the Department of Justice file on his case. The district court denied both motions after an in camera inspection of the government's file (Pet. 2, 4; Pet. App. A-2).

The evidence shows that petitioner did not file income tax returns for 1971 and 1972 until February 1974, at which time he paid the taxes due for 1970, 1971, and 1972 (Pet. 2, 4; Pet. App. A-1).

At trial, Revenue Agent Robert Scanlon testified that he learned of petitioner's failure to file returns for 1971 and 1972 while investigating a collection matter involving 1969 and 1970 taxes. He testified further that, in December 1973, he received a taxpayer delinquency



investigation concerning petitioner's 1971 return, and then decided to refer the matter of the delinquent returns to the Intelligence Division for criminal investigation (Tr. 144-153). Scanlon further testified that his referral was not prompted by petitioner's failure to pay 1969 and 1970 taxes (Tr. 161).

During trial, the government presented evidence showing that petitioner had previously failed to file tax returns on time. The evidence consisted of extracts of Internal Revenue Service records and the testimony of an Internal Revenue Service employee explaining the record extracts. The evidence disclosed that petitioner did not file returns for 1960 and 1961, filed late returns for 1963-1965 and 1967-1969, and filed timely returns for 1962, 1966, and 1970 (Tr. 60-66). In denying petitioner's motion to exclude this evidence, the trial court found the evidence relevant to the issue of intent. In its charge to the jury, the trial court instructed that the evidence of delinquencies in filing returns for prior years could be considered only on the question of criminal intent (Tr. 251-252).

The court of appeals affirmed *per curiam* (Pet. App. A-1 to A-2). It held that the evidence of petitioner's failure to file timely returns in the past was relevant to the issue of intent and therefore admissible under Fed. R. Evid. 404(b). The court concluded that the evidence was not remote because it covered the 11 consecutive years prior to the prosecution years and that the probative value of the evidence outweighed any prejudice to petitioner. After examining the government's file, the court rejected petitioner's claim of selective prosecution (Pet. App. A-2).

## ARGUMENT

1. The court of appeals correctly upheld the district court's admission of the evidence of petitioner's failure to file timely tax returns during the 11-year period prior to

the prosecution years. Traditionally, evidence of other crimes has been admissible to establish intent, motive, guilty knowledge, absence of accident or mistake, and the identity of the perpetrator, if such matters are in issue. See, *e.g.*, *United States* v. *McMillian*, 535 F. 2d 1035, 1038 (8th Cir. 1976), cert. denied, 434 U.S. 1074 (1978); *United States* v. *Calvert*, 523 F. 2d 895, 906 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976). This common law rule is now incorporated in Fed. R. Evid. 404(b) and 403.[1]

Petitioner contends (Pet. 6-7) that the decision below conflicts with *United States* v. *Myers*, 550 F. 2d 1036, 1044 (5th Cir. 1977), and *United States* v. *Rice*, 550 F. 2d 1364, 1372 (5th Cir.), cert. denied, 434 U.S. 954 (1977). In petitioner's view, the court below has not followed the Fifth Circuit's requirement that evidence of other crimes must be clear and convincing.

There is no conflict. By using the word "may," Rules 403 and 404(b) both accord the trial judge discretion in the admission of evidence of other crimes, where the evidence might be relevant on the issue of intent. Both rules make clear that the controlling standard is whether the evidence is relevant as to intent and whether it has

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[1]Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.



probative force that outweighs any prejudicial effect.[2] See *United States* v. *Weaver*, 565 F. 2d 129, 134 (8th Cir. 1977), cert. denied, 434 U.S. 1074 (1978); *United States* v. *Maestas*, 554 F. 2d 834, 836 (8th Cir.), cert. denied, 431 U.S. 972 (1977). While the court of appeals did not expressly apply a "clear and convincing" standard, it has previously held that evidence of other crimes does not have probative force in excess of its prejudicial effect, if it is not clear and convincing. See *United States* v. *Jones*, 570 F. 2d 765, 768-769 (8th Cir. 1978). In other words, the "clear and convincing" requirement is implicit in the probative force requirement. Thus, even though the Eighth Circuit may no longer use the words "clear and convincing" in every case, its decisions show a uniform application of the common law standards inherent in Rules 403 and 404(b). *United States* v. *Jones, supra*, 570 F. 2d at 769; *United States* v. *Jardan*, 552 F. 2d 216, 218-219 (8th Cir.), cert. denied, 433 U.S. 912 (1977); *United States* v. *Weaver, supra*, 565 F. 2d at 134; *United States* v. *McMillian, supra*, 535 F. 2d at 1038; *United States* v. *Bledsoe*, 531 F. 2d 888, 891 (8th Cir. 1976). Indeed, on at least one occasion since the adoption of the Federal Rules of Evidence, the Eighth Circuit has reversed a conviction because it found the evidence of prior crimes "vague and speculative," rather than "clear and convincing." *United States* v. *Jones, supra*, 570 F. 2d at 768-769.

Here, on the other hand, the court specifically determined that the evidence was adequate to establish the other acts and that the evidence met the traditional

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[2]The determination whether the probative force of the evidence exceeds its prejudicial effect requires a balancing process that involves an exercise of discretion by the trial judge, which is reviewable only for abuse. *United States* v. *McMillian, supra*, 535 F. 2d at 1038; *United States* v. *Cochran*, 499 F. 2d 380, 387-388 (5th Cir. 1974), cert. denied, 419 U.S. 1124 (1975). Petitioner has not demonstrated any abuse of discretion by the trial court.

standard of admissibility (Pet. App. A-2). An element of the offense of willful failure to file timely income tax returns is willfulness. Since petitioner did not contest his failure to file returns on time for the years in question, the only issue in dispute was willfulness. It is well established that evidence of failure to file returns for years prior to the prosecution period is relevant to the issue of willfulness. See, *e.g.*, *United States* v. *Snow*, 529 F. 2d 224, 225-226 (9th Cir.), cert. denied, 429 U.S. 821 (1976); *United States* v. *Farris*, 517 F. 2d 226, 229 (7th Cir. 1975), cert. denied, 423 U.S. 892 (1975); *United States* v. *Thompson*, 513 F. 2d 577, 579 (8th Cir. 1975); *United States* v. *Johnson*, 386 F. 2d 630 (3d Cir. 1967). The pattern of petitioner's repeated noncompliance with the requirement of filing timely returns for the preceding 11 years was relevant to show that his failures in all years were deliberate, intentional, and willful. See *United States* v. *Farris, supra*, 517 F. 2d at 229; *United States* v. *Cochran, supra*, 499 F. 2d at 387-388; *United States* v. *Johnson, supra*, 386 F. 2d at 631.

Moreover, the evidence of a pattern of deliberate recurring noncompliance with the return-filing requirement had probative value that greatly outweighed its prejudicial impact. Indeed, any prejudice to petitioner was eliminated by the trial judge's specific limiting instruction that the evidence of his prior acts could be considered only with respect to the question of intent. See, *e.g.*, *United States* v. *Carrillo*, 561 F. 2d 1125, 1127 (5th Cir. 1977); *United States* v. *Calvert, supra*, 523 F. 2d at 907.

2. Petitioner further contends (Pet. 11) that an alleged four-year delay before indictment violated his right to due process. As this Court held in *United States* v. *Lovasco*, 431 U.S. 783, 789-790 (1977), the threshold question in assessing a claim of preindictment delay is whether the



defendant suffered actual prejudice. If the delay in fact resulted in prejudice, the court must then examine the reason for the delay to determine whether it was impermissible under the circumstances. *Id.* at 788-796. See also *United States* v. *Gray*, 565 F. 2d 881, 892 (5th Cir. 1978); *United States* v. *Lane*, 561 F. 2d 1075, 1077 (2d Cir. 1977); *United States* v. *Partyka*, 561 F. 2d 118, 122 (8th Cir. 1977), cert. denied, 434 U.S. 1037 (1978); *United States* v. *Matlock*, 558 F. 2d 1328, 1330 (8th Cir.), cert. denied, 434 U.S. 872 (1977).

Petitioner does not show how the lapse of time before indictment prejudiced his ability to defend himself. Moreover, there is nothing in the record that would support the inference that the lapse of time was the product of a conscious decision to give the government a tactical advantage, or even of reckless or negligent disregard for petitioner's ability to defend himself. To the contrary, the delay in this case resulted from careful consideration of the question whether to prosecute.

3. Petitioner also argues (Pet. 10-11) that the selection of his case for prosecution was prompted by improper motivations. The courts of appeals are in agreement that the selection of certain tax offenders for prosecution is proper unless (1) others who are similarly situated are consistently not prosecuted, or (2) any selection is based on improper criteria, such as racial or religious discrimination. See *United States* v. *Murdock*, 548 F. 2d 599, 600 (5th Cir. 1977); *United States* v. *Oaks*, 527 F. 2d 937, 940 (9th Cir. 1975), cert. denied, 426 U.S. 952 (1976); *United States* v. *Swanson*, 509 F. 2d 1205, 1208 (8th Cir. 1975). There is no evidence that there was any impropriety in the selection of this case for prosecution.

Petitioner asserts (Pet. 10) that the agent's referral of his case to the Intelligence Division of the Internal Revenue Service was improperly influenced by petitioner's

refusals to comply with the agent's demands for payment of unrelated tax liabilities. But the agent testified that petitioner's failures to pay the unrelated tax liabilities did not prompt his referral of the case to the Intelligence Division. Moreover, petitioner does not allege that the person with the actual responsibility for deciding whether to prosecute, *i.e.*, the Acting Assistant Attorney General of the Tax Division, or anyone else in the decision-making process, was improperly motivated in deciding to initiate the prosecution. The final decision to prosecute was made approximately three years after petitioner's failures to comply with the purported demands for payment of the unrelated tax liabilities. It is therefore hardly likely that petitioner's failure to pay the unrelated tax contributed to the decision to prosecute. Indeed, it is much more likely that petitioner's history of persistent noncompliance with the requirement of filing timely returns was the decisive factor in selecting his case for prosecution. Surely there is nothing improper in selecting the most flagrant lawbreakers for prosecution of tax crimes. Cf. *United States* v. *Gardiner*, 531 F. 2d 953, 954 (9th Cir.), cert. denied, 429 U.S. 853 (1976).



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

M. CARR FERGUSON
*Assistant Attorney General*

CHARLES E. BROOKHART
LIBERO MARINELLI, JR.
*Attorneys*

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